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No. 86-144 (2)

In the Supreme Court of the United States

OCTOBER TERM 1986

GEORGE L. CARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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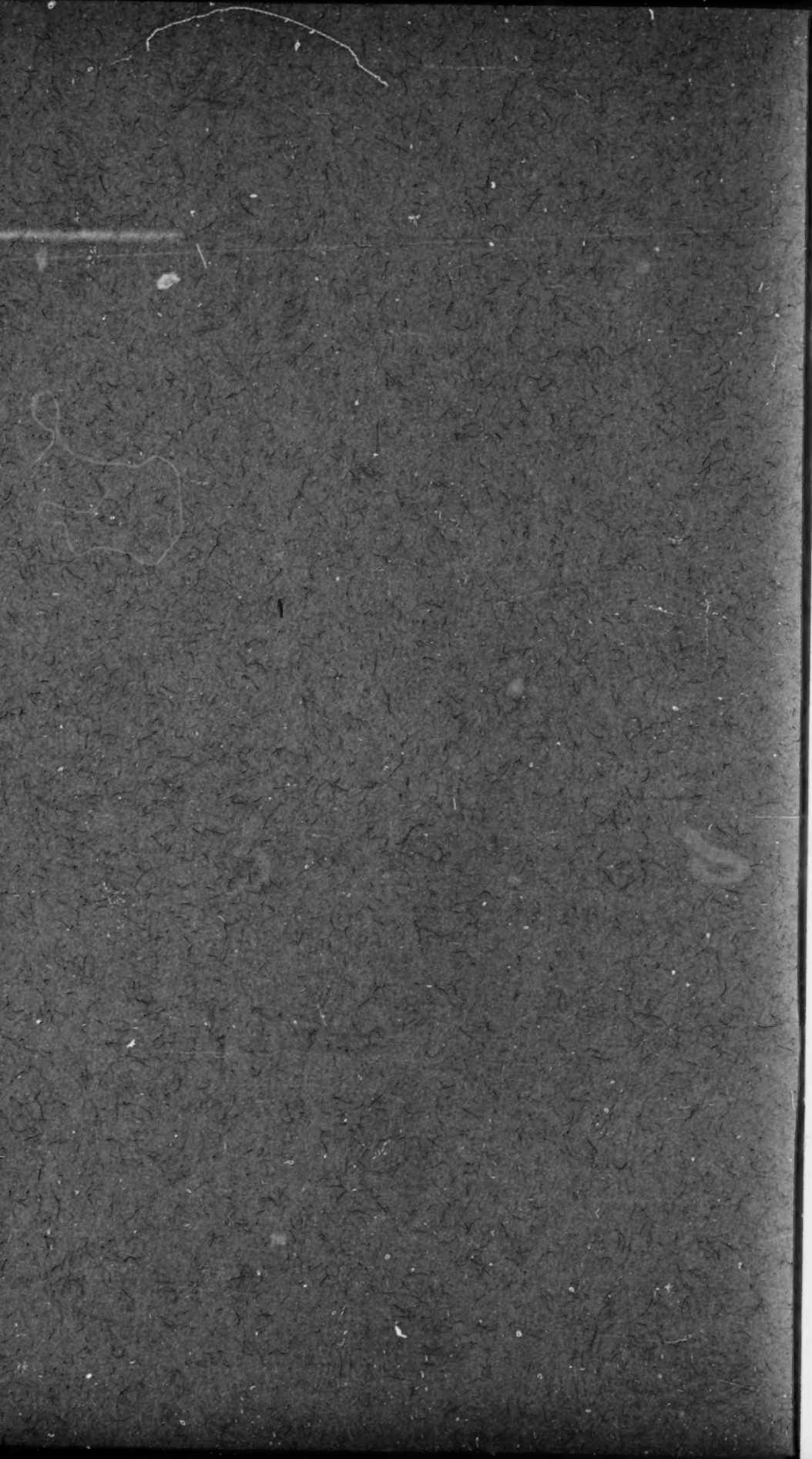

QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence seized as a result of a search to which the defendant voluntarily consented is admissible even though law enforcement officers previously viewed part of the evidence during an illegal search.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A37) is reported at 793 F.2d 1141. The earlier opinion of the court of appeals (Pet. App. A39-A47) is reported at 762 F.2d 833. The opinion of the district court on remand after the first appeal (Pet. App. A49-A63) is reported at 614 F. Supp. 507. The prior orders of the district court and magistrate (Pet. App. A64-A68) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1986. The petition for a writ of certiorari was filed on July 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On the afternoon of September 17, 1982, Joe Branick, a deputy with the Russell County, Kansas, Sheriff's Department, saw petitioner hunting turtledoves in a wildlife management area. Branick approached petitioner and engaged him in conversation. When petitioner went to retrieve a dove he had shot, Branick looked into a five-gallon pail that petitioner was using. Under a vest that was lying in the pail, Branick saw several dressed (*i.e.*, cleaned) doves. He also saw the remains of other doves scattered in the weeds near where petitioner was hunting. Pet. App. A4.

Branick then left the field and contacted Doug Sonntag, a state game protection officer, to determine whether petitioner's possession of so many doves was lawful. Sonntag informed Branick that petitioner could not lawfully "bag" more than 12 turtledoves in a day. Sonntag and Branick then returned to the wildlife management area and asked petitioner for permission to search his truck. Petitioner agreed to let them do so. In the truck, Branick and Sonntag found the pail, which contained at least 23 doves. Branick and Sonntag seized the doves. Pet. App. A4, A50. The government subsequently charged petitioner with being in possession in the field of more than his lawful "daily bag limit" of birds, in violation of the Migratory Bird Treaty Act (16 U.S.C. 707(a)) and its implementing regulations (see 50 C.F.R. 20.35 and 20.72).

2. At trial, petitioner moved to suppress the doves that Branick and Sonntag had seized. A magistrate ruled that petitioner had waived his right to object to the admission of that evidence, since petitioner had not filed a pretrial suppression motion. The magistrate then found petitioner guilty. Pet. App. A49, A65.

The district court overturned the magistrate's order. It found that the magistrate should have considered petitioner's suppression motion, that Branick's first search was

unlawful, and that the doves seized in the second search should have been excluded as the fruit of Branick's illegal first search. *Id.* at A49. Accordingly, the court directed that petitioner be acquitted (*id.* at A67-A68).

The court of appeals reversed (Pet. App. A39-A47). The court agreed that Branick's first search had violated the Fourth Amendment, because "the dressed doves [had] not [been] in plain view" (*id.* at A43). But the court disagreed that the doves were inadmissible as the fruit of an illegal search since petitioner's consent to the search of his truck, if voluntary, would have "purged the second search of any taint from the first search and validated the second search for Fourth Amendment purposes" (*id.* at A44). However, since the voluntariness of petitioner's consent was a question of fact that the district court had not previously considered, the court remanded the case for further findings on that issue (*id.* at A47).

On remand, the district court found that "there was a full and voluntary consent to the second search" (Pet. App. A49; see also *id.* at A52-A53). The court also rejected petitioner's alternative argument that, even assuming voluntariness, "consent [is] not an independent act sufficient to break the causal connection between the primary illegality and the evidence found as a result of the second search" (*id.* at A54). The court found this alternative argument foreclosed by the court of appeals' earlier holding in the case (*id.* at A62-A63).

3. The court of appeals affirmed (Pet. App. A2-A37). It noted that, in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), this Court held that evidence should not be excluded simply because the government would not have discovered it "but for" an illegal search or seizure (*id.* at A10-A12). Rather, the court noted, *Wong Sun* held that evidence should be excluded only when it is obtained through

"exploitation of [the] police illegality or by means [in]sufficiently distinguishable to purge [its] taint" (*id.* at A12). The court then determined that "[e]vidence obtained pursuant to consent 'has been come at' by defendant's *grant* of consent, not by the police request" (*ibid.* (emphasis in original)). Therefore, the court held, where evidence is derived from a consent search, "[the court] must focus on the voluntariness of [the] defendant's consent, not [on] the police officers' reasons for requesting consent" (*id.* at A14).

The court further ruled that "evidence obtained pursuant to defendant's consent is admissible only if defendant's grant of consent is voluntary under the totality of the circumstances" (Pet. App. A13, citing *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973)). This means, the court said, that consent can purge the taint of a prior illegality only when it is " 'freely and intelligently' given * * * without duress or coercion, express or implied" (Pet. App. A15-A16 (citation omitted)). The court of appeals concluded that "[t]he factors articulated in *Brown* v. *Illinois*[, 422 U.S. 590, 603-604 (1975),] are examples of the kinds of facts which a court should consider in [determining whether a] defendant's consent [is] within Fourth Amendment voluntariness standards" (Pet. App. A19).

Judge Logan concurred (Pet. App. A34-A37). He expressed concern that, under the majority's analysis, "the flagrancy of the prior police misconduct [would be] irrelevant unless the defendant is aware of the previous search * * *" (*id.* at A35)." Since the illegal activity in this case was not flagrant, however, and since there was "no hint of coercion" in the request for petitioner's consent to the search (*id.* at A36), Judge Logan agreed that the seized doves had been properly used to convict petitioner (*id.* at A37).

ARGUMENT

1. Petitioner contends that the court of appeals erred in ruling that evidence perceived during an illegal search is admissible if a defendant voluntarily consents to a subsequent search that results in the seizure of that evidence. Pet. 6-14. But the court's holding follows from this Court's decisions in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), and *Brown* v. *Illinois*, 422 U.S. 590 (1975).

In *Schneckloth*, this Court held that a search conducted pursuant to a defendant's consent need not be based on probable cause and that evidence obtained from a consent search is admissible if the consent was voluntary in the totality of the circumstances, *i.e.*, if the defendant's will was not overborne (412 U.S. at 222-223, 226). In *Brown*, the Court reaffirmed that evidence need not be excluded simply because the government would not have seized it "but for" an illegal search (422 U.S. at 597-600). Specifically, the Court held that a confession can be admissible even though it follows a Fourth Amendment violation, if the government shows that the confession is "sufficiently an act of free will to purge the primary taint" (*id.* at 602 (citation omitted)). If the suspect "decide[s] to confess, as an act of free will unaffected by the initial illegality" (*id.* at 603), the confession is admissible. See also *Taylor* v. *Alabama*, 457 U.S. 687 (1982); *Dunaway* v. *New York*, 442 U.S. 200 (1979).

The court of appeals simply applied the reasoning of these two cases. Following *Schneckloth*, the court held that, "[u]nder the Fourth Amendment, evidence obtained pursuant to [a] defendant's consent is admissible only if defendant's grant of consent is voluntary under the totality of the circumstances" (Pet. App. A13). Following *Brown*, the court held that the voluntariness of a confession following a Fourth Amendment violation turns on factors "such as the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and

flagrancy of the official misconduct" (*id.* at A17, citing *Brown* v. *Illinois*, 422 U.S. at 603-604). Putting the two cases together, the court concluded that analysis of the *Brown* factors is necessary to ensure that evidence derived from a consent search is sufficiently independent of a prior Fourth Amendment violation (*id.* at A17, A19, A33). This approach is consistent with the approach taken by other courts of appeals. See, *e.g.*, *United States* v. *Wellins*, 654 F.2d 550, 554-556 (9th Cir. 1981); *United States* v. *Sanchez-Jaramillo*, 637 F.2d 1094, 1099-1100 (7th Cir.), cert.denied, 449 U.S. 862 (1980); *United States* v. *Mullens*, 536 F.2d 997, 1000-1001 (2d Cir. 1976); *United States* v. *Race*, 529 F.2d 12, 14-15 (1st Cir. 1976); *United States* v. *Bazinet*, 462 F.2d 982, 989 (8th Cir.), cert. denied, 409 U.S. 1010 (1972).

2. Petitioner contends that the decision below conflicts with the decision of the Fifth Circuit in *United States* v. *Melendez-Gonzalez*, 727 F.2d 407 (1984). Although the court below also perceived that its decision was in conflict with that of the Fifth Circuit, we believe that both petitioner and the Tenth Circuit have overstated the degree to which the two circuits disagree.

In *Melendez-Gonzalez*, border patrol agents illegally stopped the defendant's car on a highway. They then unlawfully searched the car's trunk, where they found a large burlap sack that smelled of marijuana. The agents then took the defendant and his car into custody. Pursuant to a consent form that the defendant signed at the police station, the agents again searched the car's trunk and found 21 pounds of marijuana, which became the basis for the prosecution.

The Fifth Circuit held that the evidence seized during the consent search was improperly admitted at trial. While it did not "dispute the fact that defendant actually signed the consent form, or even that he did so voluntarily" (727 F.2d

at 413), the court held that the evidence still had to be excluded, because "for all practical purposes, the search was conducted on the highway, [and] the consent form which defendant signed at the station simply came too late." (*id.* at 414). Though superficially similar, *Melendez-Gonzalez* is in fact distinguishable from the decision below, on three important grounds.

To begin with, the order of the seizures and consents in the two cases differs significantly. In *Melendez-Gonzalez*, the agents actually seized the evidence in question before they obtained the defendant's consent to search. The agents completed an unlawful seizure and then belatedly sought the defendant's consent as a means of rescuing their otherwise unlawful seizure. In this case, by contrast, Officer Branick did not seize the doves in petitioner's pail; he merely saw them when he looked into the pail. He left the doves where he saw them, and only later sought petitioner's consent to conduct a search. In the interim, the doves remained in petitioner's possession. Officer Branick thus was not seeking petitioner's consent in order to justify a prior illegal *seizure*. Had he been doing so, the court below—like the Fifth Circuit in *Melendez-Gonzalez*—would have held the doves to be inadmissible. See Pet. App. A28 n.2 ("evidence [seized] pursuant to an illegal search * * * is inadmissible * * * regardless of defendant's subsequent consent to search").

Second, the time that elapsed and the events that occurred between the initial searches and the subsequent consents in the two cases are substantially different. In *Melendez-Gonzalez*, the officers kept the defendant in their custody continuously from the time they initially searched his car trunk until the time he consented to their renewed search. The time that elapsed between arrest and consent was short, and there were no intervening circumstances that might have purged the taint of the agents' illegal course of

conduct. It is not surprising that, under these circumstances, the Fifth Circuit found the defendant's consent to be insufficient to validate the second search of his car. In this case, by contrast, petitioner was never in police custody; he was not pressured to consent to the search; and he was not even aware of the earlier search of his pail, so his consent could not have been the product of a belief on his part that resisting the police effort to search his truck would be futile. In short, petitioner's consent to the search was wholly independent of the illegal search. Thus, this case, unlike *Melendez-Gonzalez*, is similar to cases in which, in spite of a "but for" causal relationship between illegal conduct and seized evidence, this Court has held that the effect of a prior illegal search was dissipated by subsequent acts of free will. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463 (1980) (victim's in-court identification); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (witness's decision to testify against defendant).

Finally, the flagrancy of the Fourth Amendment violations in the two cases is vastly different. In *Melendez-Gonzalez*, the police stopped and detained the defendant for an extended period without reasonable suspicion, and unlawfully searched his car on the highway without probable cause or consent. The intrusions were substantial. In this case, by contrast, Office Branick simply lifted a vest that covered petitioner's pail and looked at the pail's contents. While Officer Branick's actions may have constituted an illegal search,[1] the Fourth Amendment violation was certainly not flagrant. Under *Brown* v. *Illinois*, *supra*, the

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[1]Whether Officer Branick's conduct actually constituted a "search" is a much closer question than is apparent from the decisions of the courts below. Petitioner could only have had a quite limited expectation of privacy in an open pail carried on a hunting trip, and Officer Branick's intrusion on that expectation was, at most, minimal. See *New York* v. *Class*, No. 84-1181 (Feb. 25, 1986); *Cardwell* v. *Lewis*, 417 U.S. 583, 591-592 (1974) (plurality opinion).

"flagrancy of the official misconduct" is an important factor bearing on whether the taint of a prior Fourth Amendment violation is overcome by intervening circumstances. For that reason as well, this case is distinguishable from *Melendez-Gonzalez*.

That the decisions of the Fifth and Tenth Circuits do not conflict is further evidenced by the fact that, in a case quite similar to this one (and quite different from *Melendez-Gonzalez*), the Fifth Circuit held that a defendant's voluntary consent is an act sufficient to break the causal connection between an illegal search and a subsequent seizure of evidence derived from that prior search. In that case, *United States* v. *Fike*, 449 F.2d 191 (1971), the police conducted an arguably illegal search of an automobile when the defendant was not present. The search disclosed incriminating evidence. When the defendant returned, the police sought and obtained his consent to search the car. In that setting, the Fifth Circuit held that the fruits of the consent search did not have to be suppressed, even though the arguably unlawful first search was a "but for" cause of the later consent search. The first search, although illegal, was not flagrant, and there were significant "intervening circumstances" ensuring the voluntariness of the defendant's consent. That, of course, is precisely the reasoning applied by the court below.

Other cases from the Fifth and Tenth Circuits confirm that the two circuits do not approach consent searches following Fourth Amendment violations in fundamentally different ways. The Fifth Circuit states that, "in addition to proving voluntariness, the government must show [that there is] a sufficient break in events to undermine the inference that the consent search was caused by the fourth amendment violation" (*United States* v. *Cherry*, 759 F.2d 1196, 1210-1211 (1985)). The Tenth Circuit states the government need only show "that defendant's consent is

free of police coercion and is voluntary *in fact*" (Pet. App. A16 (emphasis in original)). The difference is purely one of form, not substance. The Fifth Circuit determines "voluntariness" without inquiring into the *Brown* v. *Illinois* factors; it considers those factors separately in determining whether "a sufficient break in events" has occurred. See *United States* v. *Cherry*, 759 F.2d at 1210-1212; *United States* v. *Wilson*, 569 F.2d 392, 395-397 (1978). The Tenth Circuit, by contrast, requires that the voluntariness inquiry itself take into account the *Brown* v. *Illinois* factors. See Pet. App. A15-A19; see also *United States* v. *Recalde*, 761 F.2d 1448, 1457-1459 (10th Cir. 1985). Labels aside, it is clear that the two circuits require identical proof in order to purge the taint of a prior Fourth Amendment violation from a subsequent consent search. Compare *United States* v. *Cherry*, 759 F.2d at 1210-1211, with *United States* v. *Recalde*, 761 F.2d at 1457-1459. Accordingly, any conflict between the Fifth and Tenth Circuits is at most perceived, and this Court's intervention is not necessary.[2]

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[2]In concurrence, Judge Logan suggested that the court below would reach a different result than would other courts in a case where the defendant is unaware of the prior illegal search. Pet. App. A35. In fact, the majority below does not appear to have adopted any such rule. See *id.* at A27 & n.1 (had "the officers used information obtained in the prior illegal search [of which petitioner did not know] to coerce [petitioner] into consenting to the subsequent search," the doves would not be admissible); *id.* at A32 ("We agree that there may be certain situations in which Government officials, using illegally obtained information, might coerce or cajole the defendant into consenting to a search [and that, u]nder such circumstances the consent would be involuntary, the search illegal, and the evidence seized thereby rendered inadmissible"). However, even if Judge Logan is correct, his speculation as to what the majority would do in a case involving coercive conduct on the part of the police has no bearing on the outcome of this case, or on the presence of a conflict among the circuits on facts such as those presented here. As Judge Logan noted, the police conduct in this case was not flagrant (see *id.* at A36); there was not a "hint of coercion" (*ibid.*). Thus, even under Judge Logan's interpretation of the majority's rationale, there is no conflict between the circuits on the facts presented here.

3. Petitioner also alleges that the court of appeals' decision conflicts with decisions of the First, Third, and Sixth Circuits. Pet. 10-14. But the cases on which petitioner relies involve attempts by the government to secure search warrants with evidence obtained in violation of the Fourth Amendment. See *United States* v. *Bailey*, 628 F.2d 938, 946 (6th Cir. 1980); *McGinnis* v. *United States*, 227 F.2d 598, 603 (1st Cir. 1955); *Fraternal Order of Eagles No. 778* v. *United States*, 57 F.2d 93, 94 (3d Cir. 1932).[3] The court below expressly rejected the idea that "law enforcement officers [could] * * * rely upon illegally obtained evidence to obtain valid search warrants or to obtain legally sufficient probable cause for searches and seizures * * *" (Pet. App. A33). Thus, the decision below plainly does not conflict with the decisions of those circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]We note that the conduct found illegal in *Fraternal Order of Eagles, No. 778* v. *United States*, 57 F.2d 93 (3d Cir. 1932), has since been found legal by this Court. See *Lewis* v. *United States*, 385 U.S. 206 (1966).